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State Water Resources Control Board

Executive Office

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Edmund G. Brown Jr.
Governor

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DELTA COUNCIL
MAILROOM

April 20, 2011

Mr. P. Joseph Grindstaff
Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Mr. Grindstaff:

WATER RIGHTS WITHIN THE BAY/DELTA WATERSHED

By letter dated April 7, 2011, you requested an updated version on the above-entitled topic.
Enclosed is an updated version of the report.

Sincerely,

Thomas Howard
Executive Director

Enclosure

cc: Phil Isenberg, Chair
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Craig Wilson
Delta Watermaster
State Water Resources Control Board

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WATER RIGHTS WITHIN THE BAY/DELTA WATERSHED STATE WATER RESOURCES CONTROL BOARD

The State Water Resources Control Board (State Water Board) is the principal agency exercising the adjudicatory and regulatory functions of the state in the field of water resources (Water Code, § 174). Included in these functions are the overarching authorities to enforce the constitutional requirement that water be diverted and used reasonably (Water Code, § 275) and the authority that water be diverted and used consistent with the public trust doctrine (National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419). The State Water Board also administers a water right permit system.

The water right permit system administered by the State Water Board (State Water Board) applies to surface water bodies and to a narrow classification of groundwater, "subterranean streams flowing in known and definite channels." (Wat. Code, § 1200.) Aquifers that are not part of a subterranean stream are classified as "percolating groundwater." There are two basic categories of surface water rights: post-1914 appropriative; and pre-1914 appropriative and riparian. The State Water Board has limited information on water use for either of these latter two classes of water rights, but is beginning to produce and synthesize electronically more information on these uses. Groundwater users in most areas of the state, including the Delta watershed, are not required to provide the State Water Board information on their water use.

Post-1914 Appropriative Water Rights

The State Water Board has permitting and licensing authority over surface water diversions associated with post-1914 appropriative water rights within the legal Delta and within the Delta watershed. December 19, 1914 is the effective date of the Water Commission Act that established the modern procedures to regulate surface water appropriation. Surface water appropriations established prior to this date are not bound by these procedures. The State Water Board maintains paper and electronic files for post-1914 permitted and licensed water rights, pending water right applications, and also state filings, which are state filed water right applications reserved for future use by individuals and entities that develop water supply projects consistent with a statewide or local general plan for management of water resources. The information in its files includes the holder of the water right, point of water diversion, limitations on the rate, amount, and season of diversion, the place and purpose of use of the water, and any other terms or conditions placed on the water right. These limitations on rate, amount, and season of use are used to determine the "face value" of the water right, defined as the total annual amount of diversion authorized for direct diversion or storage by a permit or license. The term is primarily used in the calculation of water right fees and does not take into account water availability, bypass requirements, or other conditions that may have a practical effect of limiting diversions. Therefore, as explained more thoroughly below, the "face value" or "paper water value" is not a sufficient measure of water that can be used to determine the over-allocation of water in a watershed. Further, the State Water Board has continuing authority to change existing water rights, following formal notice and opportunity for hearing, in order to protect the public trust.

and water quality and to prevent the waste, unreasonable use, and unreasonable method of use or diversion of water.

Water right permit holders are required to file progress reports with the State Water Board, and both permittees and licensees report their water diversion and use amounts (Cal. Code of Regs, tit. 23, § 847). In 2009, the State Water Board received almost 80% of the over 5,000 requested reports and is engaging in follow-up efforts on the rest. Most of the water use information reported to the State Water Board has historically been stored in paper files and there has been no verification of the quality of this information except as part of limited enforcement actions. Summary information is therefore not available to compare face value of water rights to actual use. Some water users who hold multiple rights report the same use information for all of their rights. For instance, a right holder may use 2500 acre-feet per year of water under three different water rights. If that user reports a use of 2500 acre-feet for each of the three rights, a cursory review might lead the reviewer to conclude that 7500 acre-feet of water is being used, although this is not the case. Starting in 2010 most reports will be filed electronically allowing data to be tracked and used more effectively.

Pre-1914 Appropriative and Riparian Water Rights

The State Water Board does not have permitting and licensing authority over Pre-1914 appropriative or riparian water rights. The State Water Board does however collect Statements of Water Diversion and Use (Statements) from water diverters claiming riparian and pre-1914 water rights. (Wat. Code, § 5100 et seq.) As of 2009, the State Water Board had approximately 5,500 Statements of Water Diversion and Use on file for pre-1914 and riparian rights in waters tributary to the Delta. These Statements, however, do not provide complete information about riparian and pre-1914 water diversions in California. Of particular significance in the Delta, until 2009, most Delta diverters were statutorily exempt from filing Statements. In 2009, the law was amended to require most Delta diverters to submit Statements of Water Diversion and Use. In addition, penalties were added for failure to file a report (Water Code, § 5108). Over 2000 Initial Statements of Water Diversion and Use were filed by Delta diverters claiming pre-1914 and riparian water rights. The statements do not require diverters to provide information as to how much water was diverted, only that diversions occurred. However, the new law will require monthly measurements of diversions beginning in 2012.

Groundwater

Percolating groundwater is not subject to the State Water Board's permitting system; in many areas of the state groundwater use is regulated by local agencies. When considering a proposed appropriation of groundwater, or determining whether an unpermitted diversion in close proximity to a stream is an unauthorized diversion, the State Water Board must evaluate the legal classification of the groundwater from which the water is being appropriated to determine whether it is a subterranean stream, which is under the jurisdiction of the State Water Board, or percolating groundwater, which is not. (See *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577 [43 Cal.Rptr.3d 821] [upholding State Water Board's use of four-

part test in determining legal classification of groundwater].) To the extent groundwater is classified as a subterranean stream, it is considered surface water. (See also Wat. Code, § 2500 [statutory adjudication procedures, under which all rights in a stream system are determined, apply to surface waters and subterranean streams, not percolating groundwater]. The State Water Board has no legal authority to require users of percolating groundwater to report their uses of water, other than in four southern California counties. The State Water Board does not therefore maintain information on extraction of percolating groundwater within the Delta watershed.

The constitutional Reasonable Use Doctrine does apply to groundwater use (City of Barlow v. Mojave Water Agency (2000) 23 Cal. 4th 1224). Holders of any type of water right, including rights to use percolating groundwater, must use water reasonably and beneficially. The State Water Board is empowered to institute necessary judicial, legislative, or administrative proceedings to prevent waste or unreasonable use of water.

Water Use versus Water Rights

The mean annual unimpaired or full natural flow in the Delta Watershed between 1921 and 2003 was 29 million acre-feet per annum (AFA), with a maximum of 73 million AFA in 1983.¹ Unimpaired flow is flow that would be expected in the Delta watershed in the absence of storage and other human developments. In contrast, the total face value of the approximately 6,300 active water right permits and licenses within the Delta watershed managed by the State Water Board, including the already assigned portion of state filings, is greatly in excess of these flows. Clearly, actual use is only a small fraction of the face value of these water rights; particularly since face value does not include pre-1914 and riparian water rights. Accordingly, the face value of water rights is not a sufficient measure of water that can be used to make such determinations as the extent of over-allocation of water in the Delta watershed. Reasons for this conclusion include:

- 1) The face value of many water rights are for nonconsumptive uses, such as power;
- 2) The face value represents a maximum possible water diversion, which is far greater than what is actually used. (For example, permits for storage include the full capacity of the reservoir, but large reservoirs are not emptied annually.);
- 3) Permit/license terms, such as those limiting the place of use or for protection of instream uses, further reduce below the face value the amount of water that can be diverted;

¹ DWR, Bay Delta Office, California Central Valley Unimpaired Flow Data, Fourth Edition Draft, May 2007

- 4) Water, when applied, is typically not consumed up to the full face value and the same water (return flow) is often used multiple times as it runs downstream.

While actual water use may be only a fraction of the face value of water rights, the state's water supplies have been over-allocated in many areas. The State Water Board's statutory authority to declare streams systems to be "fully appropriated" may be a method to prevent additional appropriations from being issued in already over-allocated watersheds. Water Code § 1205-1207. In addition, the State Water Board may enforce the provisions of the Water Code that are designed to prevent permit and license holders from claiming rights in excess of the amounts properly perfected and maintained under the appropriative water right system. These include the requirements for construction of permitted facilities and putting water to beneficial use with due diligence (Water Code §§ 1395 et seq., 1940) and the forfeiture of water rights for nonuse. (*Id.* §§m 1241, 1410, 1675.)²

Finally, while actual water use under existing water rights is clearly a better metric to compare with unimpaired flows than is face value, the State Water Board has limited information on actual water use. While a review and synthesis of State Water Board records can provide a rough estimate of surface water use, the State Water Board has no information on percolating groundwater pumping in the Delta Watershed.

² For example the water rights permits for the Auburn Dam have been revoked.